

Michael S. Polsky,	)	
	Movant,	)
vs.	)	Case No. 05-6045-CV-SJ-FJG
United States of America,	)	Crim No. 02-6005-01-CR-SJ-FJG
	Respondent.	)

The pending motion is silent on newly discovered evidence. Instead, movant argues that relief under United States v. Booker, 125 S.Ct. 738 (2005) is available to movant under the “watershed Constitution rule of criminal procedure” provision of Teague v. Lane, 489 U.S. 288 (1989).

For a new rule to be retroactive to cases on collateral review for purposes of a § 2255 petition, the Supreme Court itself must make the rule retroactive. Tyler v. Cain, 533 U.S. 656, 662-63 (2001). “When the Supreme Court makes a rule retroactive for collateral-review purposes, it does so unequivocally, in the form of a holding.” In re Anderson, 396 F.3d 1336 (11th Cir. 2005). In this regard, the Court agrees with the 11th Circuit that “[r]egardless of whether Booker established a ‘new rule of constitutional law’ . . . the Supreme Court has not expressly declared Booker to be retroactive to cases on collateral review.” Id. “Put simply, Booker itself was decided in the context of a direct appeal, and the Supreme Court has not since applied it to a case on collateral review.” Id. Accordingly, because movant fails to make a *prima facie* showing of either of the grounds for collateral review under § 2255, his petition for relief must be dismissed.

For all the reasons stated above, it is hereby

ORDERED that movant’s motion to vacate, set aside, or correct sentence by a person in federal custody pursuant to 28 U.S.C. § 2255, filed May 4, 2005, is denied.

/s/Fernando J. Gaitan, Jr.  
United States District Judge

Dated: June 28, 2005  
Kansas City, Missouri